IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 450 of 2001

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RAYSING SOMABHAI NAYAK

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 450 of 2001

MR NN PRAJAPATI for Petitioner No. 1

THROUGH JAIL for Petitioner No. 1

MS NV JOSHI, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 11/03/2004

ORAL JUDGEMENT

1. Ld. Counsel Mr. Prajapati appearing for the appellant accused submits that the appellant accused has

been convicted for the offence punishable under Sec.376 of Indian Penal Code and is sentenced to suffer R/I for 7 years. He is in jail since more than about 4 years and, therefore, this appeal may be heard finally. In view of above submissions, the present appeal is taken up for final hearing today though the same is filed in the year 2001.

2. This is an appeal preferred by the appellant original accused against the impugned judgment and order dated 9.05.2001 passed by ld. Additional Sessions Judge, Panch Mahals at Godhra in Sessions Case No. 41/1997 convicting the appellant accused for the offence punishable under Sec. 376 of the Indian Penal Code and sentencing him to suffer R/I for 7 Year and to pay a fine of Rs.1,000/ I/d to undergo further S/I for 6 months. However, vide impugned judgment, the appellant accused has been acquitted of the offence punishable under Sections 504, 506(2) of Indian Penal Code.

3. Heard ld. counsel Mr.NN Prajapati for the appellant accused and ld.APP Ms. Nandini Joshi for the State. Mr. Prajapati has taken me through the case of prosecution and the oral as well as documentary evidence led by the complainant side. It is the prosecution case that on 27.9.1995 at about 12.30 hours, in the ditch (Kotar) of Kasba Kharedi of Godhara town, Dist: Panch Mahals, when victim Bodiben was fetching water, accused came from behind, caught her and committed rape on her against her wish and will by threatening her to kill by showing knife and thereby committed offences punishable under Sections 376, 506(2) and 504 of Indian Penal Code. Ld. Counsel Mr. Prajapati has submitted that the finding recorded by the ld. trial Judge is erroneous on facts as well as on the point of law. Mr. Prajapati has clarified that it is the case of the appellant accused that he has not committed a rape as defined under Sec.375 of the Indian Penal Code because it was a case of consent by P.W.2 Bodiben. On relevant date, the accused was aged about 35 years and P.W.2 Bodiben posed as victim was also of same age. It is likely that both of them may be between the age of 35 & 40. As the husband of Bodiben was not keeping good health, appellant accused was a helping hand of the family and this fact is emerging from the deposition Bodiben as well as complainant P.W.1 Surajben, w/o Sanabhai Baria. Ld. trial Judge has failed in appreciating the exaggerations made by complainant Surajben in her deposition and material contradictions and omission part recorded during the course of cross-examination of the witnesses and that has resulted into gross error of law. According to Mr. Prajapati, it seems that the ld. trial Judge has not

considered the appropriate background, certain admissions made by the complainant and the fact that one important eye-witness Kailashben, d/o victim Bodiben has not been examined by the prosecution. It is rightly argued that from the facts emerging from record and case of prosecution put forward, Kailashben probably was the only eye-witness who had in turn informed the complainant Surajben about the meeting of her mother Bodiben and the accused i.e. present appellant at the spot where they were allegedly seen in a compromising position. At one place, complainant has said that victim Bodiben was inflicted two injuries with a knife by accused, but this version has not been either corroborated by victim Bodiben or by the doctor examined by prosecution before whom victim Bodiben was taken for medical check-up under a police yadi. It is the say of the prosecution that firstly victim Bodiben was taken to the house of Sarpanch so that he can be appraised about the wrong committed by the accused, but complainant has kept silent whether Sarpanch himself was made aware about the incident occurred. On the contrary, it is in evidence of prosecution witnesses that Sarpanch was not present when P.W. Bodiben and complainant Surajben had been to his residence, but his wife was there. So, it can be legitimately inferred that after Kailashben, wife of Sarpanch or Sarpanch could be the first independent witness and could have corroborated the story of prosecution. At one point of time, it clearly emerges from cross-examination that she i.e. P.W. Surajben had fired Bodiben for the alleged incident or say about her conduct of accompanying the accused and Surjaben had also warned Bodiben that her husband may take serious action for her said conduct and, therefore, Bodiben requested Surajben to do the needful and help her and, therefore only, both of them initially approached Sarpanch and thereafter police station. Undisputedly, on the day of incident, husband of Bodiben was not present and he had gone for some treatment at the residence of village Prist (popularly known as Bhuva). It is also in evidence that in the early hours of the day of incident, if P.W. Bodiben had been to the house of accused and accused was invited and called at her residence as the daughter of victim Bodiben namely Kailashben was feeling abdominal pain. This Kailashben was pregnant at relevant point of time, accused was called and to help Kailash as he was knowing some method under which abdominal pain of a pregnant lady can be substantially reduced. Non-examination of Kailashben has added a serious infirmity in the case of prosecution because complainant Surajben has accepted that even after administering treatment to Kailashben, accused did stay at the

residence of Bodiben and both of them were talking cordially and thereafter they were both seen together moving in the direction where alleged incident had happened as shown by the prosecution. It is true that as per FSL Report and medical examination of victim Bodiben, the prosecution has clearly established that when Bodiben was examined by the doctor, there were signs of intercourse in recent past, but this by itself is not sufficient to hold that the accused forcibly and/or against the will and wish of victim Bodiben had established physical relations. Panchanama of the scene of occurrence does not carry the case of prosecution further. On the contrary, absence of marks of violence or any other minor injuries on any part of the body of the victim and especially back portion of body of victim Bodiben, helps the say of he accused that incident in question is not a case of rape within the meaning of Sec.375 of Indian Penal Code.

4. The Court is aware that the accused of a rape can be convicted on a sole version of the victim and medical evidence can be looked into as a rule of prudence, but it is not necessary that in all cases opinion of doctor must corroborate the victim. However, in the present case, medical opinion contradicts the version of complainant Surajben as well as of victim Bodiben. Medical evidence may not be corroborating the version of the victim, but if it contradicts materially, then it obviously would affect the merits of the case of prosecution and there should not be conviction either on conjecture or surmises. Of course, in number of cases, this Court as well as Apex Court have observed that normally a woman would not be tempted to complain whereby she would get a permanent lifelong stigma on her. However, in none of such cases, the Courts have convicted the accused solely on that ground alone. There should be reasonable good, cogent and convincing evidence of commission of offence of rape especially when victim is of matured age and difference in age between both of them viz. victim as well as accused, is minimum. Approach of the Court in a gang-rape or case of victimisation, undisputedly, should be very different and, therefore only, the Legislature in its wisdom has taken care of the offence of rape by amending Section 376 of the Indian Penal Code.

5. In response to the query raised by this Court and in light of admissions found in the deposition of P.W. Surajben as well as P.W. Bodiben, ld. APP Ms. Joshi has fairly accepted that the element of consent emerges from the evidence of aforesaid two prosecution witnesses. Of course, accused is not supposed to establish his

defence, but he is supposed to place on record probability. This probability has not been appreciated by ld. trial Judge and so ld. counsel Mr. Prajapati has rightly argued that ld. trial Judge has committed an error of law as well as of facts. For short, the say of ld. counsel Mr. Prajapati requires to be accepted.

6. In the result, the appeal is allowed and the impugned judgment and order dated 9.05.2001 passed by ld. Additional Sessions Judge, Panch Mahals at Godhra in Sessions Case No. 41/1997 convicting the appellant accused for the offence punishable under Sec. 376 of the Indian Penal Code and sentencing him to suffer R/I for 7 Year and to pay a fine of Rs.1,000/ I/d to undergo further S/I for 6 months, is hereby quashed and set aside and the appellant accused is hereby acquitted of the offence punishable under Sec. 376 of the Indian Penal Code. The appellant accused is in jail. Hence, the appellant accused is ordered to be set at liberty forthwith if not required to be detained in any other case. Fine, if paid, be refunded to the appellant accused.

Direct Service is permitted.

[C.K.BUCH, J]

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